No. 89-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR THE CENTER FOR CLAIMS RESOLUTION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Center for Claims Resolution (the "Center") is a non-stock, not-for-profit corporation representing 20 companies that are defendants in asbestos personal injury litigation.[1] The Center was formed in October 1988

[1] The companies in the Center are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Certain-Teed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Flexitallic Gasket Co., Inc.; GAF Corp.; IU North America, Inc.; Maremont Corp.; National Gypsum Co.; National Services Industries, Inc.; Nosroc Corp.; Nuturn Corp.; Pfizer, Inc.; Quigley Co., Inc.; Shook & Fletcher Insulation Co.; T&N, PLC; Union Carbide Corp.; and United States Gypsum Co.

to deal with the unprecedented explosion in asbestos-related litigation. It represents its members in personal injury cases on a consolidated basis, thereby reducing litigation costs and facilitating settlement. The Center's goal is to settle claims for fair value. Thus, in its first 18 months of operation, the Center resolved—through settlement and dismissal—over 30,000 personal injury claims. Where settlement has not been possible, the Center has defended its members, to date trying approximately 100 cases to verdict.

Punitive damages are a substantial concern for the Center's members. As of March 1990, 71,000 cases were pending against the Center's members; virtually all of these suits include a claim for punitive damages. In essence, the punitive damages claims made against each Center member seek to punish it for the same conduct, because each such claim is predicated on allegations that the particular Center member knew of the potential hazards of asbestos but failed to warn of them. Absent some change in the law, the Center expects that almost all future actions against its members will likewise seek punitive damages. The constant threat of punitive damages in cases pending nationwide gives the Center a vital interest in the outcome of this case and a perspective on the punitive damages issue that may prove useful to the Court.[2]

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment requires "fundamental fairness" in our legal proceedings, *Lassiter* v. *Department of Social Servs.*, 452 U.S. 18, 24 (1981). One of the issues in this case is whether the Due Process Clause imposes substantive limits on the amount of punitive damages that may be awarded against a defendant in a particular case for a single wrongful course of conduct.

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[2] Written consents to the filing of this brief from the parties have been filed with the Clerk of the Court.

In framing the standards for such an excessiveness inquiry under the Due Process Clause, the Court should take note of the class of cases arising from mass tort litigation, where a single defendant can be held liable for punitive damages over and over again for precisely the same conduct. While the question of how the excessiveness inquiry should take account of multiple punitive damages awards imposed against a defendant for the same conduct is not presented here, we urge the Court to adopt a standard that does not foreclose consideration of prior punitive damages awards in assessing the excessiveness of a particular award.

In the mass tort setting, the constitutionality of any one punitive damages award cannot be judged by examining it in isolation. Excessiveness must instead be determined by reference to *all* the punishment that a defendant has suffered for the conduct in question. Otherwise, a defendant could be subjected to aggregate punishment for the same course of conduct in amounts that are constitutionally excessive, even though no single award might be so large as to be fundamentally unfair.

ARGUMENT

THE DUE PROCESS STANDARD FOR DETERMINING EXCESSIVENESS SHOULD ALLOW FOR CONSIDERATION OF ANY PRIOR PUNITIVE DAMAGES AWARDS IMPOSED ON A DEFENDANT FOR THE SAME CONDUCT

One issue presented in this case is whether the award of punitive damages against Petitioner Pacific Mutual is excessive under the Due Process Clause. For the reasons stated in the briefs for Petitioner and supporting *amici*, we believe that the award in this case was excessive and should be set aside.

In considering the standards that should govern whether an award is excessive, however, the Court should bear in mind a situation that is not present in the case

at bar, but that has become common and will be affected by the Court's decision in this case. Our concern relates to "the increasingly prevalent mass tort situation . . . [where] a defendant [is exposed] to repetitious punishment for the same culpable conduct." *In re School Asbestos Litigation*, 789 F.2d 996, 1004 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). We raise this concern because we expect that it might be urged that an award of punitive damages in a given case is not excessive, so long as that award is reasonably related to the compensatory damages awarded in the case.[3] In the mass tort setting, the imposition of punitive damages based on a seemingly reasonable relationship to the compensatory damages awarded in each particular case could result in punitive judgments that are grossly excessive in the aggregate. Accordingly, we urge the Court to adopt a standard for determining excessiveness that does not foreclose consideration of prior awards of punitive damages imposed on a defendant for the same conduct in a case where that factor is present.

A. Mass Tort Cases Present Unique Problems.

Mass tort litigation is the result of a national market for mass-produced products. Whenever a product distributed to many thousands of users has been found to injure some users, the result can easily be thousands of products liability suits brought in numerous state and federal forums by other users allegedly harmed by the product. Typically, each user files a separate claim seeking compensatory and punitive damages against the same defendant, and the multiplicity of actions creates a significant

[3] Some commentators have suggested that punitive damages would be reasonable if they do not exceed a prescribed multiple (typically three) of compensatory damages. See, *e.g.*, Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1273-74 (1987); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 314-20 (1983).

potential for multiple awards of punitive damages against a defendant for the same act or course of conduct.[4]

Asbestos products liability litigation is the leading example of such mass tort litigation. To date, more than 150,000 cases have been filed nationwide against various asbestos miners and product manufacturers,[5] and new claims are being filed nationwide against Center members alone at the rate of 2000 per month. The gravamen of these claims is that the defendants allegedly knew or should have known of a possible link between asbestos and health hazards, but did not warn users of such dangers. Punitive damages totalling millions of dollars have been assessed repeatedly against a number of defendants as punishment for alleged misconduct with respect to asbestos warnings. In the asbestos context, multiple punitive awards, imposed decades after the allegedly wrongful conduct, punish officers who did not participate in such conduct and shareholders who did not benefit from it. The size of such aggregate punitive awards, when added to the tens of thousands of large compensatory damages awards, have helped to drive asbestos producers into bankruptcy.[6]

[4] See, *e.g.*, Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice, American College of Trial Lawyers, at 20-26 (March 3, 1989); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147 (1986); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 52-53 (1982).

[5] *New York Times*, May 16, 1990, at D1, col. 4.

[6] For instance, three plaintiffs who obtained a $75 million judgment for punitive damages against Raymark Industries, Inc., instituted involuntary bankruptcy proceedings against it. *Mealey's Litigation Reports—Asbestos* (Sept. 23, 1988), at 3-5. The company's motion to dismiss the petition was denied. *In re Raymark Industries, Inc.*, 99 B.R. 298 (Bankr. E.D. Pa. 1989). See also *In re*

The asbestos product liability litigation is not unique. Mass tort litigation has arisen with respect to numerous products distributed nationwide. Examples of these mass torts include litigation involving MER/29, an anti-cholesterol drug[7]; DES, a prescription drug prescribed to prevent miscarriages[8]; bendectin, a prescription drug used to control morning sickness[9]; the Dalkon Shield intrauterine birth control device[10]; and a particular car transmission alleged to slip out of park into reverse.[11] The multiple claims filed with respect to each product generally alleged that it was defective in design or that there was a failure to warn, and it appears that most actions

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Johns-Manville Corp., 36 B.R. 743, 745-46 (Bankr. S.D.N.Y. 1984), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985), where the bankruptcy petition asserted that the exposure faced by Johns-Manville in asbestos litigation threatened its solvency and viability; as of the bankruptcy filing, litigation had resulted in ten punitive damages awards against it at an average of $616,000 per verdict.

[7] More than 1,500 suits were filed nationwide against the manufacturer, Richardson-Merrell. *Special Project—An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 704 & n.828 (1983).

[8] Approximately 1,000 suits were filed against the manufacturers. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 920 (1989).

[9] More than 1,900 suits have been filed against the manufacturers. *Id.* at 920-21.

[10] Approximately 14,000 cases have been filed against the manufacturer, A.H. Robins, *Id.* at 921. In 1985, when A.H. Robins declared bankruptcy, the company had settled some 9,200 cases for a total of $550 million, had paid or appealed punitive damages awards totalling over $23 million, and still faced over 5,000 claims for compensatory and punitive damages. *In re A.H. Robins Co.*, 89 B.R. 555, 557-58 (E.D. Va. 1988).

[11] Approximately 700 suits were filed against Ford Motor Co., the manufacturer of the transmission. Seltzer, *supra* note 4, 52 Fordham L. Rev. at 38 n.5.

sought punitive damages as well as compensatory damages.

Defendants in such cases can be exposed to overwhelming punitive damages liability. A striking illustration of this special problem can be seen in the punitive damages imposed by a jury verdict in *Cimino* v. *Raymark Industries, Inc.*, No. B-86-0456-CA (E.D. Tex., March 28, 1990) (verdict form reprinted in *Asbestos Litigation Reporter* (April 6, 1990) at 20787).[12] Phase I in *Cimino* included a consolidated trial of the defendants' liability for punitive damages to all 2,336 plaintiffs, as well as a trial on the compensatory damages claims of ten of the plaintiffs. The jury determined that four defendants were liable for punitive damages and should be assessed such damages at multipliers ranging from 1.5 to 3 times the award of compensatory damages.[13] The jury also awarded total compensatory damages of $3.5 million to the nine plaintiffs who were awarded damages.[14]

[12] The trial court in *Cimino* consolidated for disposition the asbestos actions of 2,336 plaintiffs. While it vacated part of the district court's trial plan prior to the trial by issuing a writ of mandamus, the Fifth Circuit upheld the consolidated trial on punitive damages liability. *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990).

[13] None of the defendants assessed punitive damages in *Cimino* is a Center member.

[14] The procedure employed in *Cimino* is being employed elsewhere. A West Virginia Circuit Court in *In re Asbestos Cases* has followed a similar procedure and assessed punitive damages against 3 defendants at 3 times the amount of compensatory damages awarded to 315 claimants. Nos. 84-C-3321 *et al.* (W. Va. Cir. Ct. for Kanawha County), *Asbestos Litigation Reporter* (June 2, 1989) at 19093. A Maryland Circuit Court has also recently consolidated several thousand cases for a trial on defendants' liability for punitive damages, and proposes to ask the jury to determine the appropriate multiplier for any punitive damages award. *In re Baltimore City Personal Injury & Wrongful Death Asbestos Cases*, No. 892367041 (Md. Cir. Ct. for Baltimore City) (April 24, 1990) (reprinted in *Mealey's Litigation Reports—Asbestos* (May 4, 1990) at A-1, A-17).

While details on the application of these punitive damages multipliers to the remaining 2,300 cases have yet to be determined, the final awards against each defendant could easily run into the hundreds of millions, if not billions, of dollars.[15] Few, if any, companies could survive punitive damages of such amounts. And these cases represent a small fraction of the asbestos personal injury litigation pending nationwide in state and federal courts in which those four defendants are participating. Thus, the imposition of punitive damages based on even a seemingly modest multiplier of compensatory damages can lead, in the mass tort context, to multiple punitive damages awards against a defendant for the same course of conduct that are clearly excessive.

B. This Court Should Adopt An Excessiveness Standard That Allows For Consideration Of Multiple Punitive Awards For The Same Conduct.

A seemingly reasonable relationship between the amount of punitive damages awarded in a single case and the amount of compensatory damages awarded in that case is thus an inadequate basis for determining the lack of excessiveness in the mass tort context. As Judge Friendly noted, in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967), a products liability lawsuit against the maker of the drug MER 29, "[t]he legal difficulties engendered by [hundreds of] claims for

[15] The district court in *Cimino* has not decided whether the multiplier adopted by the jury in the consolidated trial for each defendant applies to the entire award of compensatory damages to an individual plaintiff or only to the particular defendant's share of that award. If one assumes that the average total compensatory award in the remaining 2,300 cases is $300,000 and that the multiplier applies only to the defendant's share, the aggregate punitive damages award for a defendant with a 15% share (typical for the defendants assessed punitive damages in *Cimino*) could range from $155 million (multiplier of 1.5) to $310 million (multiplier of 3). These figures would escalate into the billions of dollars if the multiplier applies to the entire award of compensatory damages.

punitive damages . . . are staggering . . . [since] if all [claimants] recovered punitive damages in the amount here awarded, these would run into tens of millions."

Uncontrolled multiple awards of punitive damages against a single defendant for the same course of conduct offend the requirement of fundamental fairness imposed by the Due Process Clause. *E.g.*, *Lassiter* v. *Department of Social Servs.*, 452 U.S. 18, 24 (1981). Punitive damages are not designed to compensate plaintiffs, but instead are imposed to punish the defendant and to deter it and others from similar conduct in the future. *E.g.*, *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). As this Court has recognized, the receipt of punitive damages is therefore a "windfall" to any plaintiff. *E.g.*, *Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 267; *IBEW* v. *Foust*, 442 U.S. 42, 50 (1979). In the mass tort setting, punitive damages are also a windfall to the first few plaintiffs who recover them, as contrasted to later plaintiffs who may face a bankrupt defendant.

In the mass tort setting, however, there is no mechanism to control the aggregate level of such "windfall" awards of punitive damages in multiple actions. Each jury awards punitive damages for wrongful conduct that affected an entire class of injured parties without knowledge of prior punitive awards imposed to punish the same conduct.[16] The punitive damages award in even one of these actions might well constitute a sufficient punishment and deterrent for the conduct that gave rise to all of them. When punitive awards in a series of separate actions involving the same conduct are considered together, the aggregate awards result "in windfall awards to individual plaintiffs at the expense of a disproportion-

[16] It is no answer to suggest that the jury should be instructed on the amounts of prior punitive damages awards. Any such instruction is more likely to prejudice than to protect a defendant. *See Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. 1053, 1056 & n.1, *modified*, 718 F. Supp. 1233 (D.N.J. 1989).

ately punished defendant."[17] Thus, evaluation of each award in isolation will not protect defendants against the unfairness of multiple punitive damages awards.

Moreover, the amounts of multiple punitive damages awards are enormous when compared against the statutory civil penalties for comparable misconduct. As we have seen, the aggregate punitive damages for a defendant in *Cimino* could run into the hundreds of millions of dollars. In sharp contrast, the maximum statutory penalty imposed by the Texas legislature on a manufacturer that proximately causes injury to a person by knowingly failing to warn of a product's hazards is $25,000. Tex. Health & Safety Code Ann. § 502.012(f) (Vernon 1990).[18]

The lower courts that have considered this issue have recognized the substantial due process concerns associated with unlimited multiple punitive damages awards against a defendant for the same course of conduct.[19] However, these courts have had "the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d at 839. As a result, no single test to determine excessiveness and no single remedy for any such excessiveness has emerged from the lower court decisions.

[17] *In re Northern Dist. of Cal. "Dalkon Shield" IUD Products Liability Litigation*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *rev'd on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

[18] The Texas statutory scheme is not unique. The most populous state in the country, California, has comparable penalties for the same conduct. See Cal. Labor Code Ann. §§ 6425, 6428 (West 1989).

[19] See, *e.g.*, *Racich* v. *Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989); *In re School Asbestos Litigation*, 789 F.2d 996, 1004-05 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. at 1060-64; *Leonen* v. *Johns-Manville Corp.*, 717 F. Supp. 272, 282-83 (D.N.J. 1989); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *mand. denied sub nom., In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 862 (2d Cir. 1984); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Products Liability Litigation*, 526 F. Supp. at 899.

There are a number of possible solutions to avoid "overkill" in mass tort cases, however. One possibility would be a "one-bite" rule; that is, the first punitive award imposed against a defendant for a course of conduct would preclude all future claims for punitive damages for the same conduct.[20] Another possibility would require the trial judge to reduce the jury's punitive damages award against a defendant in a particular case by a dollar-for-dollar credit for punitive damages previously awarded against that defendant for the same course of conduct.[21]

[20] See, *e.g.*, *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. 1053, which allowed a defendant to strike a punitive damages claim upon proof that punitive damages had previously been imposed for the same conduct on the ground that due process barred the imposition of more than one punitive damages award for the same course of conduct. On reconsideration, the court conditioned its ruling upon a showing that the prior punitives award had been made after a complete hearing with an opportunity for similarly situated plaintiffs to be heard and with an instruction to the jury that its award will be the only punitive award for such conduct. 718 F. Supp. 1233, 1235. See also *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. at 728 ("In theory, . . . when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct.")

One state has partially imposed this solution by legislation. Georgia has adopted a statute prohibiting multiple recoveries against one defendant in product liability actions filed in that state, but that law has no effect on actions filed outside of the state. See Ga. Code Ann. § 51-12-5.1(e)(1) (Supp. 1989).

[21] This approach has been codified in Missouri. Missouri provides for a post-trial proceeding in which the defendant may request "the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based." Mo. Ann. Stat. § 510.263

Other solutions might be possible.[22]

The Court need not resolve this question now. We urge the Court, however, to adopt a standard for determining excessiveness in this case that leaves room for consideration of prior punitive damages imposed on a defendant for the same conduct and does not foreclose consideration of whether multiple awards of punitive damages violate due process, so that the lower courts can continue to grapple with this question and this Court can consider it in an appropriate case.[23]

(Vernon Supp. 1990). The statute permits the court to offset all prior punitive awards against a defendant for the same conduct regardless of the jurisdiction in which they were imposed.

[22] See, *e.g.*, Wheeler, *supra* note 8, 40 Ala. L. Rev. at 948. Other suggestions are not likely to solve the problem. For instance, it has been proposed that the trial judge, in reviewing the excessiveness of a particular punitive damages award, should consider evidence of prior punitive awards against the defendant for the same conduct, and reduce or set aside the present award to the extent that it imposes excessive punishment for the same conduct. See *Juzwin*, 705 F. Supp. at 1056 n.1. If the post-verdict review for excessiveness that occurred in this case is any guide, however, such review is not likely to be effective. Several courts have also suggested that all punitive damages claims should be consolidated in a single class action. *E.g.*, *Froud* v. *Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910, 913 (1982), *rev'd on other grounds*, 98 Ill. 2d 324, 456 N.E.2d 131 (1983); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. at 718 (certification of mandatory punitive damages class action). In the Center's view, such class actions are likely to create more problems than they solve. *E.g.*, *In re School Asbestos Litigation*, 789 F.2d at 1006 (noting difficulties in expanding a class to "confront effectively the punitive damage issue in the entire asbestos area").

[23] See, *e.g.*, *Simpson* v. *Pittsburgh Corning Corp.*, No. 89-7742 (2d Cir. April 16, 1990) (insufficient record precludes consideration of due process challenge to multiple awards of punitive damages); *Johnson* v. *Celotex Corp.*, No. 89-7484 (2d Cir. March 20, 1990) ("[I]nsufficient proof to demonstrate an unjust result of multiple imposition of punitive damages for the same course of conduct."); *Racich* v. *Celotex Corp.*, 887 F.2d at 398 (substantive due process issue of multiple punitive damages awards not adequately raised nor properly preserved).

CONCLUSION

For the reasons stated in the briefs for Petitioner and supporting *amici*, the judgment of the Alabama Supreme Court should be reversed and the case remanded for further proceedings. For the reasons stated in this brief, any standard for determining whether an award of punitive damages is excessive should allow for consideration of prior awards of punitive damages for the same conduct.

Respectfully submitted,

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